IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.85 OF 2003

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Nari A. Bharwani ...Petitioner

v/s.

Vibrant Securities Pvt.Ltd.
and Anr. ...Respondents

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Mr.D.D. Madan i/b Auroma Laws for the Petitioner.

Mr.M.P.S.Rao i/b Sanjay Udeshi & Co. for Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 19TH JANUARY,2005

P.C.:

1. This petition is filed under Section 34 of the Arbitration & Conciliation Act, 1996 challenging the award made by the sole arbitrator under the Bye-laws and Regulations of National Stock Exchange dated 11-11-2002. By that award the arbitrator has dismissed the claim of the Petitioner against the Respondents for a sum of Rs.17,15,808.98. The arbitrator has also directed the Petitioner to furnish an affidavit stating that the Respondent has not delivered 3750 equity shares of SBI and 500 equity shares of Nicholas Piramal India Ltd. to MIIPL on the Petitioner behalf and that the Petitioner has not claimed any credit for the said shares from anyone till date.

2. The facts that are necessary for deciding this petition are that the Petitioner was the client of the Respondent. The Respondent is the stock broker on National Stock Exchange. According to the Petitioner, in July, 1998 the Respondent was unable

to make the payment of Rs.7,75,000/- which was due to the Petitioner from the Respondent. The Petitioner also did not receive certain shares which the Respondent was obliged to deliver to the Petitioner. Therefore, a complaint was made by the Petitioner to the National Stock Exchange on 31st August, 1998. After that complaint was lodged, there were negotiations between the parties. As a result of which the Memorandum of Understanding was reached between the parties on 5th May, 1999. By that MOU the Respondent agreed that the Respondent has to pay an amount of Rs.17,89,244.56 to the Petitioner. The Respondent also agreed to pay an amount of Rs.1,99,244.56 on the date of signing of the MOU and there was an agreement for payment of balance amount by six equal installments of Rs.2,65,000/- each. On signing of MOU the Petitioner was to withdraw his complaint which had been submitted to the National Stock Exchange. It was provided in the MOU that if the Respondent commits two consecutive defaults in payment of the installments, then the petitioner would be entitled to submit a complaint to the National Stock Exchange. Admitted position is that though initially some amount was paid by the Respondent to the Petitioner, the Respondent

committed two consecutive defaults in payment of the amount agreed by the MOU. It is also an admitted position that on signing of the MOU complaint was withdrawn by the Petitioner. As default was committed by the Respondent, the Petitioner revived the complaint. It was referred to arbitration. The case of the Petitioner before the arbitrator was that an amount of Rs.17,89,244.56 is due to the Petitioner from the Respondent. The Petitioner relied on the MOU to say that the claim of the Petitioner has been admitted by the Respondent. The defence of the Respondent was that the MOU cannot be relied on by the Petitioner in support of his claim because the Respondent had entered into the MOU because of compulsion. It was also the case of the Respondent that the MOU was vitiated by fraud. Before the arbitrator both the parties did not lead any oral evidence. Both the parties relied on the documents produced by them and the arbitrator on the basis of the documents made the award. The arbitrator held that the MOU was signed by the Respondent under compulsion. It is vitiated by fraud and therefore the Petitioner cannot place reliance on the MOU. As a result the claim made by the Petitioner was dismissed.

3. The learned Counsel appearing for the Petitioner submits that the MOU relied on by the Petitioner was an admission made by the Respondent of the claim of the Petitioner. It was possible in law for the Respondent to explain the admissions contained in the MOU or also it was open to the Respondent to contend that the MOU was not binding on him because of any fraud committed by the Petitioner. It is submitted that the admissions contained in the MOU could have been explained by the Respondent by entering the witness box. Without entering the witness box it is not possible for the Respondent to explain the admissions contained in the MOU. It is further submitted that neither any fraud is alleged against the Petitioner nor any fraud is proved which would vitiate the MOU.

4. On behalf of the Respondent, on the other, it is submitted that the MOU was not binding on the Respondent because when the MOU was entered into certain documents were not available to the Respondent and certain facts were also unknown to the Respondent and therefore the MOU was entered into by

the Petitioner under a mistake and therefore the MOU is not binding on the Respondent. It was also contended that the Petitioner has also committed a fraud on the arbitrator by not producing the documents and the affidavit as directed by the arbitrator before the arbitrator. It is further contended that it was not necessary for the Respondent to enter the witness box to explain the admissions because according to the Respondent the documents which were produced by the Respondent and which were not disputed by the Petitioner explains the circumstances under which the MOU was entered into.

5. Now, in the light of these rival submissions if the record of the case is perused, it becomes clear that in the MOU there is a clear admission of the Respondent that the amount that is mentioned in that MOU is payable by the Respondent to the Petitioner. In paragraph 8 of the reply submitted before the arbitrator the Respondent stated that the Respondent received a letter dated 5th April, 1999 from the National Stock Exchange where it was stated that in view of the complaint submitted by the Petitioner the Petitioner would be paid the amount due to him from

the Respondent by the NSE from the amount of security deposit. The Respondent in paragraph 9 of his reply stated thus:

> 9. On receipt of the said letter the Respondent had no other recourse as they were not having any documentary evidence originated from the office of the Applicant and were also facing financial difficulties, but to give credit for the said shares along with credit of 500 shares of Nicholas Piramal India Ltd. which were also delivered to said MIIPL as stated above to the Applicant and enter into Memorandum of Understanding to discharge their liabilities over period of time. The said Memorandum of Understanding was entered on 5th May, 1999.

6. It is clear from the above quoted paragraph 9 that so far as the MOU is concerned, the defence of the Respondent was that they entered into the MOU because (i) lack of documentary evidence originating from the office of the Petitioner; (ii) they were

facing financial difficulties. In the reply one does not find case of any fraud on the part of the Petitioner in compelling the Respondent to enter into the MOU made out. Perusal of paragraph 13 of the award shows that the arbitrator has recorded following findings:

> "After a careful consideration of the matter, I feel that there is an some validity in the points raised by the Respondent. The Respondent's statement to the effect that he was unable to dispel effectively the impression of NSE that the question of delivery to/from third entity in respect of deals executed in NSE, compelled him to sign MOU seems to be genuine."

7. It is to be seen here that the alleged reason found by the arbitrator for the Respondent to enter into MOU is not to be found in the MOU itself. It is also not to be found in any of the correspondence between the parties. I also do not find that reason

disclosed in the reply that was filed by the Respondent before the arbitrator. Even assuming that such a stand was taken by the Respondent before the arbitrator, in my opinion, unless the Respondent enters the witness box before the arbitrator and discloses the reasons which compelled him to enter into the MOU, the alleged reason cannot be taken to have been established by the Respondent. It is further to be seen here that even assuming that there was some compulsion because of which the Respondent entered into the MOU, still the MOU cannot cease to be binding on him unless the Respondent is able to establish that the MOU is vitiated either by a fraud or by mutual mistake or any misrepresentation etc. made by the Petitioner. That the Respondent was under a mistake in entering into the MOU cannot be a reason for making the MOU not binding on the Petitioner. An admission is the strongest evidence and the admission of liability made by the Respondent cannot be lightly brushed aside by the arbitrator, as has been done in the present case. The finding recorded by the arbitrator is not based on any accepted principle of law and therefore, in my opinion, the finding recorded by the arbitrator is liable to be set

aside. It is accordingly set aside.

8. As a result, therefore, the present petition succeeds and is allowed. The award made by the arbitrator is set aside. The Respondent is directed to pay a sum of Rs.17,15,808.98 with interest at the rate of 12% p.a. from 25th July, 2000, the date on which the complaint was instituted, till the date of realisation, to the Petitioner. The Respondent shall also pay costs of this petition to the Petitioner as incurred by the Petitioner.

Petition disposed of.

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